

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

LIZBETH ANN BETTER,

Plaintiff-Appellee,

v

SECRETARY OF STATE,

Defendant-Appellant.

---

UNPUBLISHED

September 15, 1998

No. 204443

Oakland Circuit Court

LC No. 96-535559 AL

Before: Whitbeck, P.J., McDonald and T. G. Hicks\*, JJ.

MEMORANDUM.

Defendant appeals by leave granted the circuit court order setting aside defendant's administrative suspension of plaintiff's driver's license. We reverse. We decide this case without oral argument pursuant to MCR 7.214(E).

Plaintiff was arrested and charged with operating a motor vehicle under the influence of intoxicating liquor. She was taken to the police station, advised of her chemical test rights, and agreed to submit to a chemical breath test. Plaintiff failed to provide an adequate breath sample, and the machine recorded her response as a technical refusal. Defendant suspended plaintiff's driver's license for failing to comply with the implied consent statute, MCL 257.625c; MSA 9.2325(3). Plaintiff requested an administrative hearing. Plaintiff, the police officer involved in her arrest, and the officer who administrated the breath test all testified at the hearing.

In a written order, the hearing officer found that the four requirements of MCL 257.625f(4); MSA 9.2325f(4) were met, and that plaintiff had unreasonably refused to submit to the breath test. The hearing officer noted that plaintiff failed to provide medical evidence that she was unable to comply with the test requirements, and that he was unpersuaded that she was too nervous to complete the test.

Plaintiff appealed to the circuit court, which reversed the hearing officer's decision as not supported by competent, material and substantial evidence on the record. The circuit court found that in light of plaintiff's nervousness and asthmatic condition, the hearing officer erred in finding that plaintiff's

---

\* Circuit judge, sitting on the Court of Appeals by assignment.

inability to provide a breath sample constituted a refusal to take a chemical test within the meaning of MCL 257.625f; MSA 9.2325(6).

The circuit court erred in substituting its judgment for that of the hearing officer. Judicial review is limited to whether the findings of the hearing officer are supported by competent, material and substantial evidence on the record. *Walters v Secretary of State*, 170 Mich App 466, 468; 429 NW2d 188 (1988). The hearing officer has the ability to assess the credibility of the witnesses, and could properly conclude under the circumstances of the case that plaintiff was unreasonable in her refusal to properly complete the test. *Id.* at 469. While plaintiff reported that she had an asthmatic condition and was nervous, she did not require regular medication and she provided no medical evidence to support her claim. The police officer administering the breath test testified that plaintiff failed to put the mouthpiece in her mouth when she blew into the machine, supporting a finding of a willful refusal to take the test. Contrary to the requirements of Const 1963, art 6, § 28, the circuit court engaged in an improper review by giving extra credence to plaintiff's testimony. The police officers' testimony was sufficient to support the hearing officer's decision.

We reverse the circuit court decision. We reinstate the order suspending plaintiff's driver's license for refusing to take a chemical test. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Gary R. McDonald

/s/ Timothy G. Hicks